No. 04-1132

Supreme Court, U.S.
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In The
Supreme Court of the United States

LIMAGRAIN GENETICS CORP.,

Petitioner,

v.

MIDWEST OILSEEDS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

EDWARD M. MANSFIELD
Counsel of Record
BELIN LAMSON MCCORMICK ZUMBACH FLYNN, P.C.
666 Walnut Street, 2000 Financial Center
Des Moines, IA 50309
Telephone: (515) 243-7100

PAUL D. BURNS
BRADLEY & RILEY, P.C.
One South Gilbert Street
Iowa City, IA 52240
Telephone: (319) 466-1511

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. May an unsuccessful litigant, which previously argued in both the district court and the court of appeals that a particular issue was one of law, change course in the U.S. Supreme Court and obtain review by insisting that the issue is really one of fact?

2. Does a court of appeals err when it affirms summary judgment based on undisputed facts that appear in the record, even if the district court did not specifically cite those same facts?

3. Should this Court accept review of a diversity case where the petitioner is essentially rearguing the factual and state-law determinations made by the district court and the court of appeals?

CORPORATE DISCLOSURE STATEMENT

Respondent Midwest Oilseeds, Inc. ("MO") does not have any parent corporations. There is no publicly held company that owns 10 percent or more of MO's stock.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS WHY THE PETITION SHOULD BE DENIED	9
I. Summary of Argument	9
II. Limagrain Relied Below on State Law to Argue that the Enforceability of a Liquidated Damage Clause Was to Be Determined as a Matter of Law by the Court	11
III. Federal Courts May (and Do) Determine the Enforceability of Liquidated Damage Clauses as a Matter of Law	12
IV. Even If Enforceability of a Liquidated Damage Clause Were a Factual Matter, Limagrain Did Not Dispute the Facts Presented by MO	13
V. No Procedural Errors Occurred in This Case, Nor Have Limagrain's Complaints About Such Errors Been Preserved	15
VI. This Case Falls Far Short of Meeting the Standards for Certiorari Review	17
CONCLUSION	18

TABLE OF AUTHORITIES

Page

CASES:

Bridgeway Corp. v. Citibank, 201 F.3d 134 (2nd Cir. 2000) 16

Burlington Northern RR Co. v. Omaha Public Power Dist., 888 F.2d 1228 (8th Cir. 1989) 16

Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 498 U.S. 533 (1991) 12

Byrd v. Blue Ridge Elec. Cooperative, Inc., 356 U.S. 525 (1958) 12

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 15

DJ Mfg. Corp. v. United States, 86 F.3d 1130 (Fed. Cir. 1996) 14

Farmers Export Co. v. M/V Georgis Prois, 799 F.2d 159 (5th Cir. 1986) 13

Honey Dew Assocs., Inc. v. M&K Food Corp., 241 F.3d 23 (1st Cir. 2001) 13

JKC Holding Co. LLC v. Washington Sports Ventures, Inc., 264 F.3d 459 (4th Cir. 2001) 13

Kratzer v. Rockwell Collins, Inc., ___ F.3d ___, 2005 WL 405810 (8th Cir. Feb. 22, 2005) 16

Monsanto Co. v. McFarling, 363 F.3d 1336 (Fed. Cir. 2004) 13

Rohlin Const. Co. v. City of Hinton, 476 N.W.2d 78 (Iowa 1991) 3, 7, 8, 15

Ruckelshaus v. Broward County Sch. Bd., 494 F.2d 1164 (5th Cir. 1974) 13

United States v. Galletti, 124 S.Ct. 1548 (2004) 11

TABLE OF AUTHORITIES – Continued

Page

Wise v. United States, 249 U.S. 361 (1919) 12

Yockey v. Horn, 880 F.2d 945 (7th Cir. 1989) 14

STATUTES AND RULES:

Sup.Ct.R. 10 ..... 11, 17

OTHER AUTHORITIES:

Restatement (Second) of Contracts § 356 ..... 7, 8

10A Charles Alan Wright, Alan R. Miller & Mary Kay Kane, *Federal Practice and Procedure 3d* § 2720 (1998) 16

STATEMENT OF THE CASE

I. Introduction.

This breach-of-contract dispute under Iowa law was important to the parties. However, nothing in it qualifies for – let alone deserves – this Court's review. In the district court and the court of appeals, Limagrain raised only fact-based and state-law arguments. Now, it tries belatedly to manufacture some kind of federal issue in order to get this Court to accept this case. Limagrain's Petition should be summarily denied.

The players in this diversity case were two substantial seed companies – Midwest Oilseeds, Inc. ("MO") and Limagrain Genetics Corp. ("Limagrain"). MO contended, and the courts below found, that Limagrain had breached the parties' contract by secretly breeding with and licensing the progeny of MO's proprietary seeds to most of MO's competitors. Limagrain is part of a multinational conglomerate based in France (www.limagrain.com) with 5,200 employees and approximately one billion Euros in annual revenue.

In 1986, MO entered into a contract with Limagrain's predecessor Callahan Enterprises, Inc. ("CEI"). The parties agreed to make soybean seeds available to each other for breeding purposes and to pay each other royalties. However, MO, which had an established breeding program, tightly restricted the use of its seeds. CEI, which did not have valuable soybean germplasm, was given the opportunity during negotiations to protect its seeds but chose not to do so.

Thus, the 1986 contract contained specific restraints on CEI's use of MO's seeds. Generally speaking, under the

agreement, any breeding with MO seeds was prohibited. An exception was made for CEI breeding, but only so long as the resulting varieties were marketed under the 1986 agreement. CEI also had to make those varieties available to MO. And, CEI had to prohibit any third parties from breeding with those varieties. In short, as both the district court and the court of appeals concluded, the purpose and effect of the agreement were that once CEI terminated the agreement, CEI could keep selling varieties that it had already developed (while paying MO royalties), but CEI could not continue breeding with those varieties. Also, it could never allow third parties to breed with those varieties.

After signing the contract, CEI made three unsuccessful attempts to convince MO to remove the MO germplasm restrictions. When those attempts failed, CEI's new French owner (Rhone Poulenc) directed CEI to terminate the contract. CEI did so in 1989. At that point, the parties stopped exchanging seeds or collaborating with each other. Subsequently, Rhone Poulenc sold CEI to Limagrain.

Years later, however, MO discovered that CEI's successor Limagrain was breaching the germplasm restrictions in the 1986 agreement on a massive scale. Most egregiously, Limagrain had licensed a long list of companies in the soybean seed industry, including household names such as Pioneer (DuPont), Asgrow (Monsanto), Syngenta, and Delta & Pine Land, as well as lesser known smaller companies, to breed with the varieties developed from MO seeds. In effect, this destroyed the uniqueness of MO's proprietary soybean germplasm, put that germplasm in the hands of MO's direct competitors, and gave start-up companies a needed germplasm platform with which to compete with MO.

MO filed this suit in Iowa state court. In accordance with the parties' 1986 agreement, MO sought recovery of liquidated damages of $10 per bushel of soybean seed created in violation of the seed use restrictions. Limagrain removed the case to federal court.

II. Proceedings in the District Court.

Prior to trial, on July 1, 2002, both parties moved for summary judgment on various points. Limagrain's motion sought, among other things, a declaration that the liquidated damage clause in the 1986 contract – which authorized a recovery of $10 per bushel of seed produced in violation of the germplasm restrictions – was unenforceable as a matter of law. In its motion, Limagrain stated:

> *The enforceability of a liquidated damages clause is a question of law for the Court.*

Limagrain's Motion for Summary Judgment, p. 2 (emphasis added). Limagrain argued that the clause was "unenforceable as a matter of law" because it was "unreasonable" and that the district court "should dispose of the liquidated damages claim on summary judgment." Limagrain's Brief in Support of Motion for Summary Judgment, pp. 16, 22. Citing Iowa authority, Limagrain reiterated in its summary judgment brief:

> *The enforceability of a liquidated damages provision is a question of law for the court. Rohlin [Const. Co. v. City of Hinton],* 476 N.W.2d [78,] at 79 [(Iowa 1991)].

Id., p. 17 (emphasis added).

The district court disposed of the liquidated damages claim on summary judgment – just not the way that

Limagrain wanted. That is, after reviewing the evidence submitted by both parties, the court ruled that the clause was *enforceable* as a matter of law. Contrary to Limagrain's unfair mischaracterization in its Petition, the district court did not simply rely on the fact that CEI had knowingly agreed to the clause. Rather, the court stated as follows: "[T]he Court finds the ten dollar per bushel liquidated damages clause stated in the Seed Purchase Agreement to be a reasonable attempt by MO to predict the loss it might suffer if its valuable germplasm were divulged to its competitors." Petitioner's Appendix at 49a.

Limagrain then moved for reconsideration of the district court's ruling. Because Limagrain had previously moved for summary judgment on the ground that the liquidated damage amount was unreasonable as a matter of law, and had filed evidentiary materials both with its motion and with its reply memorandum, the record already contained Limagrain's evidence on this issue. Regardless, with the motion for reconsideration, Limagrain had an opportunity to submit additional evidence, if it wanted to do so, on the alleged invalidity of the liquidated damages clause. The district court considered, but denied, Limagrain's motion for reconsideration.

The summary judgment record before the district court included material assembled by MO's expert – Blake Sieker, CPA. Mr. Sieker prepared an expert report, and then was deposed on that report by Limagrain. Both MO and Limagrain filed extensive excerpts from Mr. Sieker's deposition as part of the summary judgment proceedings. MO also submitted the report itself. In addition to the report, MO filed deposition testimony where Mr. Sieker verified under oath the accuracy of his report: "The $10 figure was looked at in my report several different ways,

and I believe, as I said in my report, that in the various methods I laid out that that number is supported." Furthermore, Mr. Sieker covered the significant points from his report in his deposition testimony, much of which was also filed with the district court.

On the eve of trial, and after the summary judgment motions had already been decided, Limagrain lodged a separate *Daubert* motion to try to prevent Mr. Sieker from testifying *at trial*. That motion had nothing to do with the summary judgment proceedings. It was an effort to close the barn door after the horse had gone. The district court denied that motion as moot because it had already ruled that the liquidated damage clause was enforceable as a matter of law. MO stipulated that Mr. Sieker would not be a trial witness, so the motion *in limine* was unnecessary.

Limagrain suggests that MO's per-bushel damages should have been limited to actual damages awarded by the jury on Limagrain's counterclaim, not the agreed-upon liquidated damage figure of $10 per bushel for breach of MO's germplasm use restrictions. This is an apples-and-oranges argument. MO's claim and Limagrain's counterclaim were entirely different. MO's claim involved misappropriation of MO's intellectual property. Limagrain's counterclaim (which the district court ultimately rejected as a matter of law) was simply an allegation that MO had failed to share certain royalty payments. Limagrain asserted, incorrectly, that it was entitled to 1/3 of those royalties.

As noted, MO's claim involved Limagrain's repeated and flagrant breaches of MO's germplasm use restrictions. Those breaches resulted in a large-scale transfer of MO's

intellectual property to MO's primary competitors. Limagrain's misconduct was analogous in some ways to a Coca-Cola bottler taking the proprietary formula for Coke and secretly providing it to Pepsi, Dr. Pepper, and various other less-established companies. The damages to Coke would be substantial, but very difficult to quantify. While the sales made by Coca-Cola's competitors would have some correlation to the degree of harm, the overall damage would be much greater than just the sales that could be proved at the time of trial. This is true because many sales would not be discovered by the time of trial (or indeed would *never* be discovered), many sales would occur after the time of trial (although the district court ruled that MO's damages in this action would be limited to those proved at the time of trial), and the loss to goodwill would far exceed just lost sales (because the complaining party no longer would have unique or proprietary intellectual property to give it an advantage over its competitors).

As we have noted, Limagrain secretly licensed the progeny of MO germplasm for compensation to a "who's who" of soybean breeding (Pioneer/DuPont, Monsanto, etc.) as well as a number of newer companies. But there is more. In 1999, Limagrain and two other large companies decided to form a new entity called "Soygenetics" – to which they licensed all the progeny of MO seeds to which Limagrain had access, again in violation of the 1986 agreement. This placed MO's germplasm in the hands of a much larger competing company with five breeding stations and 35 individuals involved in breeding. These parties boasted that they could now attain a "critical mass" in plant breeding. Limagrain also violated the 1986 agreement by licensing varieties with MO parents for breeding abroad.

After holding that Limagrain had breached the seed use restrictions in the 1986 agreement and that the liquidated damages clause was enforceable, the district court conducted a trial to determine (1) the number of bushels that MO had been able to track down at that time and to which the liquidated damage formula would be applied and (2) whether Limagrain was entitled to recover on its counterclaim. The jury found the number of bushels that had been created in violation of MO's germplasm use restrictions, and also awarded Limagrain some counterclaim damages for allegedly unpaid royalties (which the district court set aside as unsupported as a matter of law). Following the entry of final judgment in MO's favor, Limagrain appealed.

III. Proceedings in the Court of Appeals.

On appeal, Limagrain spent most of its time and energy debating the proper interpretation of the 1986 contract. Limagrain devoted only six pages of its 82-page appellate brief to liquidated damages. However, on this subject, it once again argued that the liquidated damage clause "*should have been held unenforceable as a matter of law.*" Petitioner's Appendix at 59a (emphasis added).

Following full briefing and argument, the Eighth Circuit affirmed the district court. On the subject of liquidated damages, the Eighth Circuit went through a thorough analysis – more detailed, in fact, than Limagrain's cursory briefing of the issue warranted. That court applied the Iowa standards for determining whether a liquidated damage clause was an unenforceable penalty or not as set forth in *Rohlin Const. Co. v. City of Hinton*, 476 N.W.2d 78 (Iowa 1991), and the Restatement (Second) of

Contracts § 356. They are the very standards that Limagrain had asked the Court to apply.[1]

Thus, the Eighth Circuit reviewed the summary judgment record and noted that:

> (1) CEI/Limagrain "secretly licensed the progeny of MO germplasm for compensation to MO's established competitors as well as start-up companies which now can use MO's intellectual property as a platform for future development";
>
> (2) MO "lost not only royalties but also a market advantage because it now has to compete against its own seeds";
>
> (3) in a recent transaction, "a company's germplasm portfolio sold for over 28 times the amount of annual royalty revenue produced by that germplasm";
>
> (4) "the damage to MO goes far beyond the losses MO has suffered thus far";
>
> (5) "MO lost streams of revenue from future generations of seeds with MO ancestors"; and
>
> (6) informal and oral agreements abound in the soybean seed industry (indeed, MO tumbled upon one such arrangement by sheer happenstance and provided it to the district court), making it

[1] Under the *Rohlin*/Restatement § 356 analysis, there is a sliding scale: "If the difficulty of proof of loss is great, considerable latitude is allowed in the approximation of anticipated or actual harm." Restatement (Second) of Contracts § 356, cmt. b (quoted in *Rohlin*, 476 N.W.2d at 80). Furthermore, a liquidated damage provision may be sustained on the basis of either anticipated or actual loss. *Id.*

> "nearly impossible to find and trace the unauthorized use of MO germplasm."

Petitioner's Appendix at 22a-25a. None of these facts were ever challenged by Limagrain with competent evidence.

Accordingly, the Eighth Circuit held that "where MO advanced uncontested facts showing the $10 amount were reasonable, the district court properly determined the liquidated-damages provision was enforceable." Petitioner's Appendix at 25a.

Limagrain petitioned for panel rehearing and rehearing en banc. In its petition, Limagrain argued that the case involved "a question of exceptional importance" (although that supposedly important "question" was never identified) and that the court "overlooked certain material facts." The Eighth Circuit denied the petition without asking MO to respond to it.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Summary of Argument.

The Petition should be denied for a number of reasons.

First, Limagrain cannot use its own invited "error" as a basis for obtaining certiorari review. In the courts below, Limagrain argued that the enforceability of a liquidated damage provision was a matter of law for the *court* to determine. It cannot make a 180-degree reversal now.

Second, even if Limagrain had not waived its present argument below, there has been no Seventh Amendment violation. Limagrain in effect argues that there is always a

Seventh Amendment right to a jury trial in federal court on whether a liquidated damage clause is valid. That is an absurd proposition. What would be the point of a liquidated damage clause, if the defendant always could get a jury trial on whether the clause is valid (so long as the defendant maneuvered the case into federal court)? How could parties ever achieve predictability, which is the very purpose of a liquidated damage provision? In any event, scores of federal appellate courts have held that the enforceability of a liquidated damage clause can be determined as a matter of law. Limagrain cites no authority to the contrary.

Third, even if the enforceability of a liquidated damage clause were a "fact" question, Limagrain still had to generate a fact issue sufficient to avoid summary judgment. It failed to do so below, and even here is unable to demonstrate any fact that the court of appeals got wrong, with the exception of one immaterial and very minor item.

Fourth, Limagrain has no procedural ground to complain about the entry of summary judgment against it on liquidated damages. To put it charitably, Limagrain is telling this Court far less than the full story in its Petition. Limagrain did not file a "narrow" motion in the district court (Petition at 6), but a broad one that raised all the matters it now claims were not considered. Limagrain also fails to mention that it later filed a motion for reconsideration on liquidated damages, which was also considered by the district court. Additionally, Limagrain omits to mention that its motion *in limine* which remains "pending," "unresolved," and "unadjudicated" had nothing to do with the summary judgment proceedings. It was filed after summary judgment had been granted and was denied as moot because Mr. Sieker was no longer going to be a trial

witness. Limagrain also avoids reference to the well-established proposition that an appeals court may affirm summary judgment based on any undisputed evidence in the record. An appellate court does not have to, and often does not, cite and rely upon exactly the same evidence as the district court.

Lastly, the Petition never explains how this case might meet the standards for a grant of certiorari set forth in Sup. Ct. R. 10. This case does not meet those standards. This is, and always has been, a breach of contract case arising under Iowa law.

For all these reasons, the Petition should be denied.

II. Limagrain Relied Below on State Law to Argue that the Enforceability of a Liquidated Damage Clause Was to Be Determined as a Matter of Law by the Court.

Directly contrary to the position it is taking here, Limagrain argued below that the enforceability of the liquidated damage clause was a question of law for the court. Limagrain also cited only Iowa law for that proposition. Thus, the position being asserted here by Limagrain – that the Eighth Circuit should not have relied on Iowa law to hold that the enforceability of a liquidated damage clause is a question of law – is the *opposite* of what it argued below. For that reason alone, Limagrain's petition should be denied.

In short, Limagrain is urging this Court to overturn the very legal holding that it asked the courts below to make. *See United States v. Galletti*, 124 S.Ct. 1548, 1552 n.1 (2004) (holding that party "forfeited" argument by not

raising it below); *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 548 (1991) (declining to consider argument not raised in the courts below). That is impermissible.

III. Federal Courts May (and Do) Determine the Enforceability of Liquidated Damage Clauses as a Matter of Law.

Limagrain argues for an astonishing proposition. In the guts of its Petition, Limagrain maintains that the enforceability of a liquidated damages clause in a federal court case always must be determined by a jury. Anything else, according to Limagrain, violates the Seventh Amendment. Petition at 14-21.

This is nonsense of the highest order. For one thing, if juries always got to decide the validity of liquidated damage clauses in federal court litigation, one would be hard-pressed to think of a reason for having such clauses. Liquidated damage provisions are employed in commercial contracts because they result in stability and predictability. *See Wise v. United States*, 249 U.S. 361, 366-67 (1919) (upholding liquidated damage clause on the ground that "[t]he parties to the contract . . . were much more competent to justly determine what the amount of damage would be . . . than a court or jury would be . . ."). Limagrain would like to take that away.

In this case, the lower courts' enforcement of the liquidated damage provision did not violate *Byrd v. Blue Ridge Elec. Cooperative, Inc.*, 356 U.S. 525 (1958), or any other precedent of this Court. Time and again, federal courts have ruled that the enforceability of liquidated damage clauses is a question of law for the Court, whether

the case arises in diversity or under federal law. *See, e.g., Monsanto Co. v. McFarling,* 363 F.3d 1336, 1344 (Fed. Cir. 2004) ("validity of a liquidated damages clause is a question of law") (Missouri law); *JKC Holding Co. LLC v. Washington Sports Ventures, Inc.*, 264 F.3d 459, 468 (4th Cir. 2001) ("a question of law to be determined by the court") (New York law); *Farmers Export Co. v. M/V Georgis Prois*, 799 F.2d 159, 162 (5th Cir. 1986) ("a question of law for the court") (applying general maritime law). As one court has said:

> It is virtually the unanimous rule of all jurisdictions that whether a stipulation is for liquidated damages or a penalty is a question of law for the court.

Ruckelshaus v. Broward County Sch. Bd., 494 F.2d 1164, 1165 (5th Cir. 1974) (Tuttle, J.).

Otherwise stated, even if the court of appeals should not have relied on *Iowa* law for the proposition that enforceability of a liquidated damage clause is a question of law, it committed no error, because the rule would have been the same under federal law or anywhere else.

IV. Even If Enforceability of a Liquidated Damage Clause Were a Factual Matter, Limagrain Did Not Dispute the Facts Presented by MO.

Furthermore, even if the Eighth Circuit erred in ruling (along with a multitude of other courts) that the enforceability of a liquidated damage clause is a question of law, that would not change the result in this case. The Eighth Circuit also ruled, and Limagrain does not dispute, that it had the burden of demonstrating the clause was a penalty. Petitioner's Appendix at 20a-21a. *See also Honey*

Dew Assocs., Inc. v. M&K Food Corp., 241 F.3d 23, 27 (1st Cir. 2001); *DJ Mfg. Corp. v. United States*, 86 F.3d 1130, 1134 (Fed. Cir. 1996); *Yockey v. Horn*, 880 F.2d 945, 952 (7th Cir. 1989). Limagrain failed to do so. None of the key facts discussed above was rebutted by Limagrain with actual evidence, in the district court or in the court of appeals. Even if the enforceability of the clause were a question of fact, Limagrain would have had to present sufficient evidence to warrant a trial, and it failed to do so.

As the court of appeals put it, MO presented "*uncontested facts showing the $10 amount was reasonable.*" Petitioner's Appendix at 25a (emphasis added). So even if the ultimate question were one of "fact," the undisputed facts entitled MO to summary judgment, which is precisely what the court of appeals ruled.

Notably, on page 10 footnote 4 of its Petition, Limagrain furnishes its only "example" of a factual error purportedly committed by the Eighth Circuit. The alleged mistake is trivial. The Eighth Circuit referred to a germplasm exchange agreement where MO voluntarily made available certain seeds to Pioneer in return for royalties of up to $1.80 per bushel. (The $1.80 number comes directly from a report prepared by Limagrain's expert and is found in the Joint Appendix at JA 879. Actually, his $1.80 figure was on a "per unit" basis which translates to $2.16 per bushel. A unit of soybeans is equivalent to 5/6 of a bushel.) The Eighth Circuit said that MO received in return the "exclusive" right to use Pioneer germplasm. The word "exclusive" should have been omitted since MO received a non-exclusive right. Otherwise, the Eighth Circuit got the facts entirely right.

In reality, both the district court and the court of appeals correctly applied current Iowa law to the undisputed facts in this case. It is telling that Limagrain urges this Court in its Petition to follow stale Iowa liquidated damage precedents from the early 20th century. *See* Petition at 13, 15. Those precedents long antedate Iowa's adoption of the more progressive Second Restatement approach to liquidated damages in *Rohlin*, 476 N.W.2d 78. This Court does not grant certiorari to resolve issues of state law, but it is revealing that Limagrain has to go back to obsolete Iowa case law from 1900 or 1915 to try to make its points.

V. No Procedural Errors Occurred in This Case, Nor Have Limagrain's Complaints About Such Errors Been Preserved.

Limagrain's complaints about a "sua sponte" grant of summary judgment (Petition at 22-23) are another Johnny-come-lately argument that was never raised in the court of appeals. While Limagrain disagreed with the merits of the district court's liquidated damage ruling, it never asked the Eighth Circuit to reverse on the grounds that it was a "sua sponte" ruling. *See* Petitioner's Appendix at 54a-59a (Limagrain's briefing on liquidated damages). It is too late to ask this Court to do the same. This argument too has been waived.

In any event, Limagrain had no basis for objecting to the district court's ruling on procedural grounds. As this Court said in *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986), "[D]istrict courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she

had to come forward with all of her evidence." *See Burlington Northern RR Co. v. Omaha Public Power Dist.*, 888 F.2d 1228, 1231 n.3 (8th Cir. 1989) (summary judgment may be granted *sua sponte* against the moving party when that party has had a full and fair opportunity to contest that there are no genuine issues of material fact to be tried); 10A Charles Alan Wright, Alan R. Miller & Mary Kay Kane, *Federal Practice and Procedure 3d* § 2720 at 347, 351-52 (1998). Here Limagrain had moved for summary judgment on the ground that the $10 liquidated damage amount was unreasonable as a matter of law and it submitted two waves of evidence on this point – the very same point on which the district court entered summary judgment against it. Furthermore, the district court later received and considered Limagrain's motion for reconsideration on liquidated damages. Thus, in case Limagrain had not presented everything it had during the extensive summary judgment briefing, this gave Limagrain the opportunity to bring forward any additional evidence or arguments. Limagrain, however, had nothing new to say. Even now, Limagrain has not identified any evidence that it did not get a chance to submit. *See Bridgeway Corp. v. Citibank*, 201 F.3d 134, 140 (2nd Cir. 2000) (finding no procedural prejudice given that the appellant failed to identify any specific evidence that it would have presented).

Limagrain's criticisms of the court of appeals are similarly unwarranted. It is well established that a summary judgment may be affirmed on any ground supported by the record. *See Kratzer v. Rockwell Collins, Inc.*, ___ F.3d ___, 2005 WL 405810 (8th Cir. Feb. 22, 2005). The

Eighth Circuit was entitled to cite specific undisputed evidence whether the district court had mentioned it or not. In the end, the Eighth Circuit's rationale and the district court's were the same, namely, that "the ten dollar per bushel liquidated damages clause stated in the Seed Purchase Agreement [was] a reasonable attempt by MO to predict the loss it might suffer if its valuable germplasm were divulged to its competitors." Petitioner's Appendix at 49a.

VI. This Case Falls Far Short of Meeting the Standards for Certiorari Review.

Finally, even if all the above were not true, there would be no reason, let alone a "compelling" one, to grant certiorari in this case. Sup. Ct. R. 10. The Eighth Circuit has not entered a decision in conflict with that of another court of appeals on the same matter. Nor has it so far departed from the accepted and usual course of judicial proceedings to call for an exercise of this Court's supervisory power. It has not decided an important federal question in a way that conflicts with relevant decisions of this Court. At most, Limagrain is alleging, without any basis for doing so, that the courts below made erroneous factual findings or misapplied a correctly stated rule of law. *Id.* Those are not valid reasons for granting a writ.

CONCLUSION

Limagrain lost this diversity case because it flagrantly and repeatedly breached its contract with MO. It did not lose this case because either of the lower courts resolved any issue of federal law against it. This Court should deny the Petition.

Respectfully submitted,

BELIN LAMSON MCCORMICK
ZUMBACH FLYNN, P.C.
A PROFESSIONAL CORPORATION

EDWARD M. MANSFIELD
Counsel of Record
666 Walnut Street,
2000 Financial Center
Des Moines, IA 50309
Telephone: (515) 243-7100

PAUL D. BURNS
BRADLEY & RILEY, P.C.
One South Gilbert Street
Iowa City, IA 52240
Telephone: (319) 466-1511

Attorneys for Respondent